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No. 88-964 (2)

In The

Supreme Court of the United States

October Term, 1988

JAMES C. HOWES,

Petitioner,

v.

NORTH DAKOTA WORKERS COMPENSATION BUREAU AND LEINGANG STEEL SIDING,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. WHETHER THE CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS REQUIRES A STATE AGENCY TO PAY THE COSTS AND EXPENSES ASSOCIATED WITH THE ATTENDANCE OF A CLAIMANT'S WITNESSES AT AN ADMINISTRATIVE HEARING.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The North Dakota Workers Compensation Bureau (Bureau) is a state administrative agency charged with administering the North Dakota workers compensation fund and laws. *See* North Dakota Century Code (N.D.C.C.) title 65. In determining whether a claimant is entitled to benefits, the Bureau follows the procedures established by the North Dakota Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. To receive benefits from the Bureau, a claimant must prove by a preponderance of

the evidence that an injury is causally related to employment and that the ensuing disability is causally connected to the employment injury. If the Bureau terminates benefits, a claimant has the burden of proving his or her right to continue receiving benefits.

James Howes sustained an employment-related injury at Leingang Steel Siding on July 10, 1985. He was hospitalized for a period of several days following the injury. Howes returned to employment with Leingang Steel Siding on July 22, 1985. On July 23, 1985, he filed a medical expense claim with the Bureau. The Bureau accepted Howes' claim and awarded him medical expense benefits and disability benefits for his hospitalization and treatment and lost wages in connection with the work-related injury.

Howes was discharged from his employment with Leingang Steel Siding in March, 1986, because of his poor work attitude and performance. On April 26, 1986, through May 14, 1986, Howes was hospitalized because he suffered severe headaches. Howes then requested additional medical expense benefits and disability benefits.

The Bureau issued a formal order denying additional benefits on October 6, 1986. After the Bureau issued that order, Howes submitted a request that the Bureau schedule (at Bureau expense) the deposition of a neurologist, Dr. Larson. Dr. Larson had treated Howes since the early 1980's, and he had examined Howes both at the time of his hospitalization in 1985 and when he was hospitalized again in 1986. In response to Howes' request, the Bureau sent a letter to Dr. Larson asking questions relating to

Howes' case. Dr. Larson responded with a letter suggesting that the Bureau schedule a comprehensive evaluation at a hospital. The Bureau then scheduled a comprehensive medical assessment and paid all the costs of the assessment.

The team of experts conducting the assessment included several medical doctors and other medical professionals. The team conducted tests and was unable to find a causal connection between the injury Howes sustained on July 10, 1985, and his subsequent hospitalization on April 26, 1986. The team did find evidence that Howes' headaches may be related to previous injuries not related to Howes' employment. Coincidentally, Dr. Larson was a member of the team of experts who examined Howes at the Bureau's request.

The Bureau then scheduled a formal hearing for August 5, 1987. Prior to that hearing Howes did not make any specific requests to cross-examine any expert witnesses other than Dr. Larson. Howes' request that the Bureau schedule Dr. Larson's deposition was made before the Bureau scheduled the comprehensive medical assessment. At the hearing, Howes made a general demand to be given an opportunity to cross-examine expert witnesses who had submitted documents to the Bureau, if the Bureau intended to rely on those documents. The demand included the opportunity to cross-examine Dr. Larson and would have required the Bureau to pay all costs and expenses for examination of all expert witnesses.

In response to this general demand, Howes was informed that the Bureau would not assume the costs.

North Dakota law granted Howes the opportunity to cross-examine medical experts whose opinions were a part of the record the Bureau relied upon in making decisions regarding Howes' claim. However, North Dakota law did not require the Bureau to pay for the costs of deposing Dr. Larson. *See* N.D.C.C. § 28-32-09. Howes testified at the hearing but did not present testimony from any other witnesses. On September 14, 1987, the Bureau issued an order affirming its previous order denying further benefits to Howes.

SUMMARY OF ARGUMENT

This is not an appropriate case for review upon writ of certiorari because (1) this case does not present any important question of federal law and (2) the decision below is consistent with this Court's decisions on the right to procedural due process.

Howes' choice to forego cross-examination of his treating physician at his hearing because he would have had to pay the costs of that examination does not present an important question of federal law. North Dakota law requires the Bureau to pay the claimant's attorney's fees and costs on appeal. N.D.C.C. § 65-02-08. North Dakota law places the expense of witness fees upon the party calling the witness to testify at an administrative hearing. N.D.C.C. § 28-32-09. The decision regarding the allocation of costs associated with the attendance of witnesses at administrative hearings is a legislative function.

Howes was not denied his fundamental right to confront and cross-examine witnesses. Dr. Larson was

Howes' treating physician. Howes received notice and an opportunity for a hearing. He was given complete access to the Bureau's files and all the medical reports prior to the hearing. He was given the opportunity to present evidence to the Bureau. His attorney's fees and appeal costs were paid by the Bureau. Finally, Howes received a hearing and judicial review of the Bureau's decision. There are no special or important reasons why this Court should grant certiorari in this case.

ARGUMENT

The petitioner has failed to set out special or important reasons why this Court should grant a writ of certiorari in this case. There are several substantial reasons why the petition should be denied.

I. THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court established the requirements for due process in administrative proceedings involving the termination of public assistance payments. This Court decided that procedural due process requires timely and adequate notice of the hearing as well as an opportunity to defend at the hearing by confronting any adverse witnesses and by presenting evidence.

The Bureau did not deny these procedural remedies to Howes and imposed no procedural limitations on Howes' ability to assert his rights. Howes received notice and an opportunity for a hearing. Prior to the hearing he

received complete access to the Bureau's files and all medical reports. He was allowed to present evidence to the Bureau. Howes had the opportunity to have Dr. Larson attend the hearing. Howes chose to forego the opportunity because the Bureau would not pay the anticipated costs. Howes' attorney's fees and appeal costs were paid by the Bureau. He received judicial review of the Bureau's decision. Thus, all of the procedural due process requirements specified in *Goldberg v. Kelly*, 397 U.S. 254 (1970), were met. Howes' petition for certiorari, therefore, rests upon the narrow claim that the Constitution requires the Bureau to pay the costs associated with the attendance and examination of his treating physician at the administrative hearing.

North Dakota law granted Howes, upon written request, the opportunity to cross-examine medical experts whose opinions were part of the record relied upon by the Bureau. The costs of taking depositions and subpoenaing expert witnesses for cross-examination are governed by N.D.C.C. § 28-32-09, which reads in relevant part:

> **28-32-09. Subpoena and attendance of witnesses.** . . . The deposition of a witness or party in any proceeding before an agency may be taken in the same manner and on the same notice as in a civil action pending in the district court. Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court. A party, other than the administrative agency, must first show good cause before undertaking discovery proceedings, including interrogatories. Any witness who is subpoenaed under the provisions of this section and who appears at the hearing, or whose deposition is

> taken, shall receive the same fees and mileage as a witness in a civil case and in the district court, and such fees shall be paid by the party or agency at whose instance the witness appears or his deposition is taken.

In *Froysland v. North Dakota Workers Compensation Bureau*, Civil No. 880155 (N.D. December 6, 1988), the North Dakota Supreme Court held that N.D.C.C. § 28-32-09 requires the Bureau to bear the costs of discovery of expert witnesses when the witnesses were originally retained by the Bureau and their opinions were relied upon to refute the conclusions of the claimant's treating physician. The court distinguished the decision in Howes' case by noting that Howes wanted to cross-examine his own physician rather than one relied upon by the Bureau to refute Howes' claim.

This case does not present a substantial question of procedural due process. Howes was clearly given the opportunity to present his case to the Bureau. Rather, it involves a question relating to the allocation of costs for the attendance of witnesses at administrative hearings. Decisions regarding the allocation of such costs have traditionally been a state, legislative function and responsibility. 3 *Larson Workmen's Compensation Law*, § 83.20 (1988).

The North Dakota Legislature's decision to have claimants pay their witness costs in these cases does not violate claimants' procedural due process rights. Due process is a flexible concept and the procedural protections required are dependent upon the factual situation. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Procedural due process requirements are shaped, in part, by the risk of

error inherent in the truth-finding process. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A medical assessment of a worker's physical condition is a focused decision which is based upon standard reports by physician specialists. The information the Bureau uses to decide whether to extend or deny benefits is contained in medical test results and opinions, all of which the Bureau provides to the claimant's attorney prior to a hearing. In such circumstances, the "specter of questionable credibility and veracity is not present." *Richardson v. Perales*, 402 U.S. 389, 504 (1971). Therefore, the statutory allocation to Howes of the costs associated with the attendance of Howes' expert witnesses at his hearing is a considered decision that does not fundamentally affect the truth-finding process or violate the fourteenth amendment.

II. THE DECISION OF THE NORTH DAKOTA SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISIONS ON THE RIGHT TO PROCEDURAL DUE PROCESS.

Howes has not cited any cases in which this Court has found a constitutional duty on the part of a state agency to pay the claimants' costs of securing their witnesses' testimony at a hearing. The case petitioner cites as allegedly being in conflict with the North Dakota Supreme Court decision here is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). *Loudermill* is not on point. That case concerned the necessity of providing notice and an opportunity to be heard to public employee's who have a property interest in their job before that employment is terminated. *Loudermill* did not

concern who had to pay for the examination of Loudermill's witnesses.

In *Richardson v. Perales*, 402 U.S. 389 (1971), this Court held that the requirements of procedural due process were not violated by the admission into evidence of medical reports (hearsay evidence) at an administrative hearing concerning a claimant's eligibility for Social Security disability benefits. In that case, the claimant asserted that he was denied the right of cross-examination; however, he had the opportunity to examine the evidence prior to the hearing and he also had the right to request subpoenas for the physicians. The Court held that the right of cross-examination was not denied.

Howes attempts to distinguish the Court's decision in *Richardson* from this case because the Social Security Administration was required to pay the costs of securing the physician's attendance at the hearing. The fact that the Social Security Administration was obligated to pay the cost when subpoenas were requested was inconsequential to the Court's decision. The Court's decision was based upon the fact that Perales had the right to examine the written medical reports prior to his hearing and he also had the opportunity to examine the authors of the reports at the hearing. Howes had similar opportunities. His right to procedural due process was not denied.

Prior decisions of this Court support the North Dakota Supreme Court's decision here. This Court has held that the decisions of the legislative branch with regard to procedural due process remedies are entitled to appropriate weight. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). This Court has also

held that considerations of cost must play a role in deciding the level of procedural protection a property right should receive. *Ingraham v. Wright,* 430 U.S. 651 (1977). In *Matthews v. Eldridge,* 424 U.S. 319 (1976), this Court established that the fiscal and administrative burdens of additional or substitute procedural requirements must be considered when determining the requirements of procedural due process.

The North Dakota Supreme Court wisely recognized and balanced these considerations in Howes' case and in its decision in *Froysland v. North Dakota Workers Compensation Bureau,* Civil Number 880155 (N.D. December 6, 1988). Requiring the Bureau to pay the costs of deposing Howes' physician would impose substantial expense and administrative burdens upon the North Dakota workers compensation fund. The Legislature is best equipped to balance this expense against competing interests and to prescribe the means of allocating expenses associated with the conduct of administrative hearings.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated this 9th day of January, 1989.

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